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Case No. 07

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM SILVERSTEIN

Petitioner,

vs.

EXPERIENCED INTERNET.COM, INC., PATRICIA QUESADA,
SYLVIA BEDOYA and DOES 1-50

Respondents.

On Appeal to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the District Court's refusal to exercise jurisdiction over Respondents Experienced Internet.com, Inc., Patricia Quesada and Sylvia Bedoya for sending unsolicited email advertisements with pornographic content in violation of the law.

Two questions are presented:

1. Whether a defendant can avoid the exercise of personal jurisdiction by filing an affidavit claiming that some unnamed third party was responsible for Plaintiff's damages.
2. Whether the district court erred in refusing to allow discovery to determine the true facts regarding jurisdiction.

LIST OF PARTIES

The parties are listed in the caption. To the extent that Respondents claim that some other parties have an interest in the action, they have failed to identify such third parties.

CORPORATE DISCLOSURE STATEMENT

Petitioner William Silverstein is the sole proprietor of an Internet service provider with his principal place of business in Los Angeles, California.

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Appendix B — Order Denying Motion For Leave To File Motion for Reconsideration (N.D.Cal. August 25, 2005)

Appendix C — Memorandum Opinion (9th Cir. February 14, 2008)

Appendix D — Plaintiff's Request For Judicial notice In Support Of Plaintiff's motion For Leave To File Motion For Reconsideration Of Order Dismissing Action (N.D.Cal.PACER Document 26, filed August 9, 2005

OPINIONS BELOW

The findings of fact of the district court are provided in an unpublished decision. The conclusions of law of the district court are similarly recorded in an unpublished decision. The final judgment of the district court is recorded on PACER. The Ninth Circuit decision of February 14, 2008, is also unreported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment of the district court was entered on August 25, 2005. A notice of appeal was filed on September 23, 2005, and the case was docketed in the court of appeals on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Petitioner filed a timely petition for writ of certiorari on May 8, 2008.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 7705(a):

> The Commission may issue regulations to implement the provisions of this Act (not including the amendments made by sections 4 and 12). Any such regulations shall be issued in accordance with section 553 of title 5.

15 U.S.C. § 7706(g):

> (1) Action authorized
> A provider of Internet access service adversely affected by a violation of section 7704 (a)(1), (b), or (d) of this title, or a pattern or practice

that violates paragraph (2), (3), (4), or (5) of section 7704 (a) of this title, may bring a civil action in any district court of the United States with jurisdiction over the defendant—

(A) to enjoin further violation by the defendant; or

(B) to recover damages in an amount equal to the greater of—

(i) actual monetary loss incurred by the provider of Internet access service as a result of such violation; or

(ii) the amount determined under paragraph (3).

16 C.F.R. Part 316(a)(1):

> (a) Any person who initiates, to a protected computer, the transmission of a commercial electronic mail message that includes sexually oriented material must:
>
> (1) Exclude sexually oriented materials from the subject heading for the electronic mail message and include in the subject heading the phrase ``SEXUALLY-EXPLICIT:'' in capital letters as the first nineteen (19) characters at the beginning of the subject line;\1\

\1\ The phrase ``SEXUALLY-EXPLICIT'' comprises 17 characters, including the dash between the two words. The colon (:) and the space following the phrase are the 18th and 19th characters.

STATEMENT OF THE CASE

Plaintiff conducts business as an Internet Service Provider. Beginning in March, 2004, Defendants initiated email advertising to William Silverstein's

equipment located in the State of California for the purpose of relaying pornographic unsolicited electronic mail advertisements. The email messages' subject lines did not contain any warning that the body of the email contained sexually explicit content in violation of federal law. Federal regulations require a warning in the subject line that the body of the email contains sexually explicit content. (16 C.F.R. Part 316.)

Defendants' servers are hosted by a California company. Defendants admit to doing business in California. Defendants admit to operating an affiliate program with affiliates in California. Defendants' web site is set up to accept California customers. Defendants use a payment processing service in California. Defendants intended to solicit customers in California.

Defendants claimed that all of the activities alleged in the complaint were undertaken by some other person, and that they merely "leased" the domain name to the unnamed third party and collected money on its behalf.

Respondents filed a certificate of interested parties pursuant to local rule, but the certificate did not contain any name other than those of Respondents.

Respondents refused to disclose the identity of the person or persons they claimed to be actually liable for the alleged torts.

REASONS FOR GRANTING OF THE WRIT

Petitioner should only need to make a *prima facie* showing of personal jurisdiction. (*Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002).) In determining whether Petitioner has

met his *prima facie* burden, uncontroverted allegations in the complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in favor of Petitioner. (*Id.* (quoting *Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996)).) Moreover, evidentiary materials are construed in the light most favorable to Petitioner and all doubts resolved in his favor. (*Id.* (quoting *Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n. 1 (9th Cir. 1990)).) "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (*Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957).)

Petitioner's Verified First Amended Complaint and evidentiary materials submitted pursuant to requests for judicial notice made a *prima facie* showing that the exercise of personal jurisdiction was reasonable under the circumstances, and Defendants made only cursory denials, so the lower court erred both in dismissing the case, and in refusing to allow even limited discovery into jurisdictional facts.

Review by this Court is necessary to address a split of authority with regard to whether a defendant may simply dispute jurisdictional facts and thereby defeat the exercise of personal jurisdiction.

Review of this case is essential to inform litigants whether a defendant can avoid personal jurisdiction by filing a declaration pointing the finger at an unnamed third party.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE EXERCISE OF JURISDICTION.

A. The Sixth Circuit Has Found That A Defendant May Not Avoid Exercise Of Personal Jurisdiction On The Mere Basis Of Contrary Assertions

The district court in the instant case stated that "Plaintiff submits no competent evidence to rebut Defendant's declarations attesting that they are not doing business in California... do no advertising in California... and did not cause any of the subject email to be sent to anyone in California." The Court ignored the allegations of the Verified Complaint, despite *Runnels v. Rosendale*, 499 F.2d 733, 734 n. 1 (9th Cir. 1974), cited in the district court's second footnote.

Defendants should not be allowed to "avoid personal jurisdiction simply by filing an affidavit denying all jurisdictional facts". (*Compuserve Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996).) "[B]ald denials of pleaded facts" are insufficient to overcome the exercise of jurisdiction. (*Professional Investors Life Ins. Co. v. Roussel*, 445 F.Supp. 687, 692 9 (D.Kan. 1978).)

Defendants intentionally set up their business in a manner designed to avoid responsibility for bad acts. Their claim that some unnamed third party is the true bad actor allows them to evade responsibility while the unnamed third party vanishes like a ghost.

B. The District Court Should Have Exercised Personal Jurisdiction Because Injury In The Forum Warrants The Exercise of Personal Jurisdiction

Where no applicable federal statute governs personal jurisdiction, federal courts apply the law of the state in which the Court sits. (*See Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d, 1482, 1484 (9th Cir. 1993).) The federal cause of action in this case is brought under the CAN-SPAM Act, codified at 15 U.S.C. sections 7701, *et seq*. Pursuant to Section 7706(g), a provider of Internet access service may bring a civil action for violations of CAN-SPAM "in any district court of the United States with jurisdiction over the defendant." Because the federal law does not specify the court's jurisdictional reach for these claims, state law governs. (*Core-VentCorp.*, 11 F.3d at 1484.)

California's long-arm statute allows courts to exercise personal jurisdiction over defendants to the extent permitted by the Due Process Clause of the United States Constitution. (*See* Cal. Civ. Proc. § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); *see also Core-Vent*, *supra*, 11 F.3d at 1484.)

Due process requires that "in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945). Under the due process analysis, a state may exercise either general or specific jurisdiction over a defendant. (*See*

Helicopteros Nacionales de Colombia, S.A. v. Hall; 466 U.S. 408, 414-15 (1984).)

The fact that Respondents sent unsolicited commercial emails from their places of business does not control, because the liability did not arise until the emails went through Internet services providers' servers and were received by Plaintiff and his customers in California.

1. **California May Exercise Specific Jurisdiction Over Those Who Intentionally Direct Email Advertising To California Residents.**

Defendants sent unlawful email advertising to equipment located within California. They should not now be rendered immune by the implied claim that they have not exacted sufficient economic benefit from the forum to make it worth their while to defend a lawsuit alleging harm that resulted from Defendants' unlawful activities.

The "effects test" established in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1994) allows the exercise of personal jurisdiction based upon "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered - and which the defendant knows is likely to be suffered - in the forum state." (*Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).)

Email messages can serve as the basis for the exercise of jurisdiction on this basis. (*Edias Software Int'l, L.L.C. v. Basis Int'l Ltd.*, 947 F.Supp. 413, 420 (D. Ariz 1996).) "Allowing Defendant to escape personal jurisdiction in a forum they exploited for pecuniary gain while causing a tort to a ... resident

would constitute a manifest unfairness". (*Verizon Online Services, Inc. v. Ralsky*, 203 F.Supp.2d 601, 604 (E.D.Va.2002) .)

2. California Courts May Exercise Jurisdiction Over Commercial Email Advertisers

Sending millions of email messages to persons in a specific forum constitutes "activities within a state [that] are 'substantial' or 'continuous and systematic'." (*Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952).) Plaintiff's verified Complaint demonstrates that the Defendants have directed commercial advertising at California residents repeatedly, including Plaintiff and his customers.

The nature of email advertising suggests that the Defendants have been sending their messages to many other California residents besides Plaintiff. (*See Ferguson v. Friendfinders, Inc.*, 94 Cal.App.4th 1255, 1265 (Cal. Ct. App 2002) (acknowledging that "unsolicited email advertising is sent in 'bulk' "); *see also Verizon, supra,* 203 F.Supp.2d at 606 (defining spam as "an unsolicited, often commercial, message transmitted through the Internet as a mass mailing to a large number of recipients") (quoting MICROSOFT ENCARTA COLLEGE DICTIONARY 1383 (2001).)

Causing multiple email messages to go to each of thousands or perhaps millions of residents is substantial activity. The Defendants have been benefiting economically from advertising directed to California residents. They should not have the luxury of paying people to send their ads into California,

accepting money from California residents (who buy the advertised products), and then being able to avoid responsibility for their actions by filing an affidavit that is a bare denial of jurisdictional facts.

3. Defendants Should Be Subject to General Jurisdiction

Defendants admit to commercial relationships with multiple California companies, including a web host (iPowerWeb) and a credit card processing company (Paycom.net). In addition, they programmed their web site to accept California residents as customers, evidenced by the form that lists California within a pick box. All of the relationships Defendants have with California companies add up to systematic and continuous contacts with the state. The bare assertions in their affidavits do not deny these jurisdictional facts.

4. Respondents Operate A Commercial Web Site

Defendants' web site is an active web site. The nearly universally accepted test arose from the case of *Zippo Manufacturing Company v. Zippo Dot Com, Inc.* (E.D.Pa. 1997) 952 F.Supp. 1119. (*See, e.g., Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (quoting *Zippo* with approval).) *Zippo* sets forth the framework for determining "the nature and quality" of activity on the Internet. (*Zippo, supra*, 952 F.Supp. at 1124.) One federal court decision explains that the first part of the *Zippo* test is to determine the "interactivity level" of a web site at issue. "Internet sites have been categorized in three ways, according to interactivity levels: (1) interactive sites used to conduct business over the Web; (2) semi-interactive sites allowing the exchange of information with a host computer; and (3) passive sites allowing access to information but not enabling the exchange

of information with a host computer." (*Machulsky v. Hall* (D.N.J. 2002) 210 F.Supp.2d 531, 538-39.)

When the Internet communication is via the World Wide Web, the use of interactive web sites for commercial purposes should result in jurisdiction, and the use of passive web sites should not. (*See Zippo, supra*, 952 F.Supp. at 1124; *Cybersell, supra,* 130 F.3d at 419-20 (stating that passive web site does not constitute purposeful availment).)

In this case, the Defendants' web site is specifically programmed to accept customers in California and advertises that it already has female customers in Los Angeles. The web site is a highly interactive commercial web site and the exercise of general jurisdiction should be appropriate under the *Zippo* test. That the web site automatically interacts with California customers by using a payment processing company in California further warrants the exercise of general jurisdiction.

5. Defendants Should Not Be Allowed To Avoid The Exercise of Jurisdiction By Pointing the Finger At Someone Else

For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. (*Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed. 2d 404 (1969).) "[T]he central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." (*Hughes v. Tobacco Institute, Inc.*, 278 F.3d 417, 420-21 (5th Cir.2001).)

Plaintiff has shown that advertising directed at California residents ultimately benefited Defendants

by driving traffic to their domain name. Defendants will allow only that they "facilitated" the business of selling a sexually explicit web site through sexually explicit email advertising in violation of federal law.

Northern District Local Rule 3-16(b)(1) requires that each party must "disclose any persons... known by the party to have either: (i) a financial interest (of any kind) in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding." Defendants should not be able to simply assert that unnamed "customers" in privity are the true beneficiaries of the unlawful advertising without actually identifying that person they allege to be the responsible party.

To avoid the exercise of jurisdiction, a defendant must show compelling evidence. Defendants have not presented any uncontroverted facts which would show that the exercise of jurisdiction would be unreasonable. Allowing tortfeasors to shift harm to legitimate businesses prevents a level playing field and allows them to avoid jurisdiction by merely denying allegations in a Verified Complaint facts still at issue allows them to avoid the bright light of truth.

The Defendants' conduct and connections to the forum are of the Defendants' own choosing. Neither Plaintiff nor his customers ever requested to receive any pornographic email communication from Defendants.

C. The Court Erred In Refusing To Allow Discovery

Petitioner requested that he be allowed to conduct discovery into the claims of Defendants that California courts may not exercise jurisdiction. The

Court should have allowed Petitioner to make discovery requests limited to the question of personal jurisdiction, particularly since Respondents were claiming that some unnamed entity, known to them but not disclosed in the certificate of interested parties, was the true responsible party. Discovery would have revealed evidence showing Defendant's true connections to the "third party" they claimed to be responsible, and would also have shown specific connections to California sufficient to support the exercise of general jurisdiction. (*See, e.g.*, Appendix "D", Plaintiff's Request For Judicial Notice (suggesting that Defendants' actually operated their business using an address in California).)

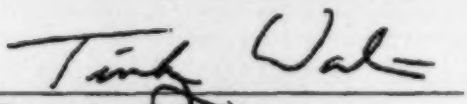
CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

July 14, 2008

WALTON & ROESS LLP



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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

WILLIAM SILVERSTEIN, an individual Plaintiff, v. EXPERIENCED INTERNET.COM, INC., et al., Defendants.	Case No.: C 05-0160 PVT ORDER GRANTING MOTION TO DISMISS

On June 8, 2005, Defendants filed a motion to dismiss the amended complaint.[1] Plaintiff opposed the motion. Having reviewed the papers submitted by the parties, the court finds it appropriate to rule on the motion without oral argument. Both parties have consented to Magistrate Judge Jurisdiction. Based on the briefs and arguments presented,

IT IS HEREBY ORDERED that Defendants' motion is GRANTED without leave to amend based on lack of personal jurisdiction.

I. BACKGROUND

Plaintiff William Silverstein ("Plaintiff") is the sole proprietor of an internet service provider with its principal place of business in Los Angeles, California. Defendant Experienced Internet.com ("EIC") is a Florida corporation

[1] The holding of this court is limited to the facts and the particular circumstances underlying the present motion.

with its principal place of business in Miami, Florida. Defendant Patricia Quesada, a Miami resident, is EIC's Director and President. Defendant Sylvia Bedoya, also a Miami resident, is EIC's Vice President.

Plaintiff alleges that Defendants used Plaintiff's servers to deliver unsolicited electronic mail ("email") advertisements containing sexually explicit content. He further alleges that the subject lines of these emails were not prefixed with the "SEXUALLY-EXPLICIT" designation required by 16 C.F.R. Part 316 and 15 U.S.C. 7705(d)(1)(A). Therefore, Plaintiff's electronic filters were unable to separate these emails from regular email. Some of these unsolicited emails were delivered, via Plaintiff's servers, to a personal computer in Santa Clara County, California. Plaintiff alleges that although he asked Defendants to discontinue this practice, they continued to intermittently send such emails through his server.

Plaintiff sued for Violation of the CAN-SPAM Act, and for Violation of California Business & Professions Code § 17529.5. Defendants moved to dismiss for lack of personal jurisdiction, among other grounds. On May 12, 2005, this court granted Defendants' motion to dismiss for lack of personal jurisdiction, with leave to amend.

On May 29, 2005, Plaintiff filed a Verified First Amended Complaint for Damages and Injunctive Relief. Defendants have now again moved to dismiss pursuant to Federal Rules of Civil Procedure Rule 12(b)(2) (lack of personal jurisdiction), (3) (improper venue), and (6) (failure to state a claim upon which relief can be granted). Defendants also request that Plaintiff be required to post a bond. Plaintiff opposed the motion.

II. DISCUSSION

Where no applicable federal statute governs personal jurisdiction, federal courts apply the law of the state in which the court sits. *See Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1484 (9th Cir. 1993). The only federal cause of action in this case is brought under the

CAN-SPAM Act, codified at 15 U.S.C. sections 7701, *et seq.* Pursuant to Section 7706(g), a provider of internet access service may bring a civil action for violations of CAN-SPAM "in any district court of the United States with jurisdiction over the defendant." Because the federal law does not specify the court's jurisdictional reach for these claims, state law governs. *Core-Vent Corp.*, 11 F.3d at 1484.

California's long-arm statute allows courts to exercise personal jurisdiction over defendants to the extent permitted by the Due Process Clause of the United States Constitution. *See* CAL. CODE CIV. PRO. § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); *Core-Vent*, 11 F.3d at 1484. Thus, the court "need only determine whether personal jurisdiction in this case would meet the requirements of due process." *See Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1258 (9th Cir. 1989).

Due process requires that "in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Under the due process analysis, a state may exercise either general or specific jurisdiction over a defendant. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984).

If a defendant's activities within the forum state are "continuous and systematic" or "substantial," the state has a sufficient relationship with the defendant to assert general jurisdiction. *See Perkins v. Benguet Consol. Mining*

Co., 342 U.S. 437, 445, 447 (1952). If a forum state cannot assert general jurisdiction over the defendant, it may still assert specific jurisdiction based on the quality and nature of the defendant's contacts with the forum state in relation to the cause of action. *See Data Disc, Inc. v. Systems Tech. Assocs., Incs.*, 557 F.2d 1280, 1287 (9th Cir. 1977).

When a trial court rules on a jurisdictional challenge by relying on declarations and discovery materials without holding an evidentiary hearing, dismissal is appropriate if the plaintiff fails to make a prima facie showing of personal jurisdiction. *See American Telephone & Telegraph Company v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996). In determining whether the plaintiff has made a prima facie showing of personal jurisdiction, uncontroverted allegations in the complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor. *Id.*

Plaintiff argues this court has general jurisdiction over Defendants because Defendants engaged in "continuous and systematic" activity within California by systematically directing commercial advertising at California residents and by doing business with "multiple California companies." In the alternative, Plaintiff claims this court has specific jurisdiction because Defendants purportedly sent multiple commercial email messages to Plaintiff. But Plaintiff submits no competent evidence to rebut Defendants' declarations attesting that they are not doing business in California, have no employees nor customers in California, do no advertising in California,

own no property in California, have no address or phone listing in California, and did not cause any of the subject emails to be sent to anyone in California.

The only "evidence" submitted by Plaintiff is his verified complaint. When the allegations contained in a verified complaint are based on personal knowledge, they are equivalent to an affidavit for purposes of a motion to dismiss for lack of personal jurisdiction. *See, e.g., Leonard A. Feinberg, Inc. v. Central Asia Capital Corp., Ltd.*, 936 F.Supp. 250, 255 n. 4 (E.D.Pa. 1996).[2] Here, the allegations that Defendants are doing business in California[3] and sent commercial emails into California are not the equivalent of an affidavit, because Plaintiff bases those allegations on "information and belief" rather than on his own personal knowledge.[4]

Because Defendants dispute the jurisdictional facts with competent declarations,[5] Plaintiff's jurisdictional

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[2] *See also Runnels v. Rosendale*, 499 F.2d 733, 734 n. 1 (9th Cir. 1974) (finding in the context of a motion for summary judgment that a verified complaint may be considered equivalent to an affidavit to the extent it meets the requirements of Rule 56(e), i.e., that it is based on personal knowledge, sets forth facts admissible in evidence, and affirmatively shows that the affiant is competent to testify to the matters stated therein).

[3] Including having customers in California, hiring person(s) to conduct business in California, having one or more of their websites hosted by a California company, and planning to open a marketing division in California.

[4] To the extent the complaint occasionally references the emails as having been "sent by" Defendants without qualifying the allegation as one made on information and belief, there is no sufficient showing that Plaintiff is competent to testify as to who sent the emails. Thus, those allegations are also not the equivalent of an affidavit. *See Runnels v. Rosendale*, 499 F.2d at 734 n. 1.

[5] Declarations signed under penalty of perjury are equivalent to affidavits. See 28 U.S.C. 1746.

allegations are not "uncontroverted." Even though disputes contained in parties' affidavits must be resolved in a plaintiff's favor, here Plaintiff did not submit any affidavits or other competent evidence that would support his claim that Defendants are engaged in business in California, nor his claim that they sent the emails in question. In fact, there is no competent evidence in the record before this court to show *any* contacts between any of the Defendants and California.[6]

Defendants' declarations adequately rebut Plaintiff's unsupported allegations that Defendants sent the subject emails. *See Data Disc, Inc. v. Systems Tech. Assocs., Incs.*, 557 F.2d at 1284 (noting the court may not assume the truth of allegations in a pleading which are contradicted by affidavits). Thus, Plaintiff has failed to make a prima facie showing that Defendants have sufficient minimum contacts with California to warrant the exercise of personal jurisdiction over Defendants in California.

III. OBJECTIONS TO EVIDENCE

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[6] Defendant Quesada concedes in her declaration that experiencedinternet.com is hosted by Ipowerweb.com. However, there is no competent evidence before the court showing that Ipowerweb.com is located in California. Moreover, that one contact is not sufficiently "continuous and systematic" or "substantial" to confer general jurisdiction. *See Bancroft & Masters, Inc. v. Augusta Natl. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (agreements with a handful of vendors "constitute doing business with California, but do not constitute doing business in California" so as to confer general jurisdiction). And there is no factual showing that the claims alleged in the complaint "arise out of or relate to" Ipowerweb.com's hosting ofexperiencedinternet.com so as to confer specific jurisdiction. *See Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987).

Plaintiff filed written objections to Defendants' declarations.

Plaintiff objects to the declarations in general on the grounds that they turn the motion into a motion for summary judgment, purportedly without adequate notice to him. The court hereby OVERRULES this objection. Generally courts may consider declarations in ruling on a motion to dismiss for lack of personal jurisdiction. *See Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F2d. at 1289. Moreover, this court's prior order, by taking Defendants' declarations into consideration and expressly stating that courts do consider declarations in connection with a motion to dismiss for lack of personal jurisdiction, gave Plaintiff adequate notice that the court would accept and consider declarations from the parties in connection with this motion. It was incumbent upon Plaintiff to obtain competent evidentiary support for his allegation that this court has personal jurisdiction, and he simply failed to do so.

Plaintiff next objects to the declaration of Defendant Quesada at 11:25-27 ("EIC does not operate the website at www.sexsearch.com to the extent that 'operate' involves the running of a business through use of that domain") on grounds that it asserts a legal conclusion, assumes facts not in evidence, and is not the best evidence of the asserted statement. The court hereby OVERRULES this objection. The statement is not a legal conclusion, but rather a factual assertion regarding the nature of Defendants' use of the website, the statement on its face does not appear to assume the existence of any fact other than those of which

the declarant has personal knowledge, and the best evidence rule applies only to proof of the content of documents not statements regarding the use of documents (*see* FED. R. EVID. 1002).

Plaintiff also objects to the declaration of Defendant Quesada at 12:21-23 ("Based on Defendants' investigation, Defendants believe that the emails were sent by a person that was terminated from the Sexsearch affiliate program on or before October 18, 2004") on grounds that it is not based on personal knowledge, assumes facts not in evidence, and "makes no sense whatsoever." The court SUSTAINS this objection on the first two grounds (the third asserted ground is not a legally cognizable grounds for objecting to testimony).

Finally, Plaintiff objects to the declaration of Defendant Quesada at 12:26-13:1 ("EIC's customer's affiliate program operates through strict terms and conditions, which not only include anti-spamming rules, but explicitly instruct the affiliate that he is not an agent of that customer") on grounds that it is not best evidence, asserts a legal conclusion, incorporates hearsay, and assumes facts not in evidence. The court SUSTAINS this objection on grounds of hearsay and assumption of facts not in evidence.

IV. CONCLUSION

Dismissal is warranted because Plaintiff has not made a sufficient showing that Defendants had "continuous and systematic" or "substantial" activity in California so as to warrant an exercise of general jurisdiction, nor that

Defendants caused any commercial emails to be sent to California such as might warrant an exercise of specific jurisdiction. Thus Plaintiff fails to establish that this court has personal jurisdiction over any of the Defendants. In light of this ruling, the court need not rule on the preemption, venue and bond issues.

Dated: *7/8/05*

/s/ Patricia V. Trumbull
PATRICIA V. TRUMBULL
United States Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

WILLIAM SILVERSTEIN, an individual Plaintiff, v. EXPERIENCED INTERNET.COM, INC., et al., Defendants.	Case No.: C 05-0160 PVT **ORDER DENYING MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION**

On July 21, 2005, Plaintiff filed a motion for leave to file a motion for reconsideration.[1] Defendants opposed the motion,[2] and Plaintiff filed a reply. Having reviewed the papers submitted by the parties, the court finds it appropriate to rule on the motion without oral argument. Based on the briefs and arguments presented,

IT IS HEREBY ORDERED that Plaintiff's motion for leave to file a motion for reconsideration is DENIED.

Civil Local Rule 7-9 requires a party moving for leave to file a motion for reconsideration to show:

> (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is

[1] The holding of this court is limited to the facts and the particular circumstances underlying the present motion.

[2] Under Civil Local Rule 7-9(d) no response was required.

> sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
>
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Plaintiff submits additional and/or purportedly "new" evidence in the form of various catalog pages and internet pages related to www.sexsearch.com. None of the purported evidence is material to a determination of whether the court has personal jurisdiction over Defendants, because Plaintiff never rebutted Defendants' showing that they do not operate www.sexsearch.com.[3] Thus, the additional evidence does not warrant leave to move for reconsideration.

Plaintiff also argues that the court's ruling was erroneous because it "shifted" the burden to Plaintiff. However, when a defendant moves to dismiss a complaint for lack of personal jurisdiction pursuant to Rule 12(b)(2),[4] the plaintiff bears the burden of demonstrating that jurisdiction is appropriate. *See Schwarzenegger v. Fred*

---

[3] Plaintiff also has not shown that "in the exercise of reasonable diligence [he] did not know such fact or law at the time of the interlocutory order."

[4] Plaintiff appears to argue that the court should have applied the standard for ruling on a motion under Rule 12(b)(6) (failure to state a claim upon which relief can be granted) to a motion under Rule 12(b)(2) (lack of jurisdiction over the person). Plaintiff cites no case where a court has done so.

Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). Plaintiff failed to carry that burden, and thus dismissal was required. Because Plaintiff has not shown that the court failed to consider dispositive legal arguments, leave to move for reconsideration is not warranted.

Dated: *8/25/05*

/s/ Patricia V. Trumbull .
PATRICIA V. TRUMBULL
United States Magistrate Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 14 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

WILLIAM SILVERSTEIN, an individual Plaintiff - Appellant, v. EXPERIENCED INTERNET.COM, INC., a Florida corporation; PATRICIA QUESADA, an individual; SYLVIA BEDOYA, an individual, Defendants - Appellees.	No. 05-16882 D.C. No.: CV-05-0160-PVT MEMORANDUM*

Appeal from the United States District Court
For the Northern District of California
Patricia V. Trumbull, Magistrate Judge, Presiding

Argued and Submitted January 18, 2008
San Francisco, California

Before: WALLACE, HUG, and SCHROEDER, Circuit Judges.

William Silverstein ("Silverstein") appeals the district court's dismissal for lack of jurisdiction and its denial of Silverstein's motion for reconsideration. He alleged that he is an Internet Service Provider ("ISP") and

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

that Experienced Internet.com, Inc. ("EIC") sent him unsolicited commercial emails ("spam"), in violation of the CAN-SPAM Act, 15 U.S.C. § 7701-7713, and the California Business & Professions Code § 17500 et seq. He Also named EIC's President, Patricia Quesada ("Quesada"), and Vice President, Sylvia Bedoya ("Bedoya"), as defendants in the action. The district court granted defendants' motion to dismiss for lack of personal jurisdiction. This appeal followed.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we AFFIRM the district court.

Silverstein conducts business as an ISP with the principal place of business in Los Angeles, California. EIC is a Florida corporation with its principal place of business in Miami, Florida. Quesada and Bedoya are both residents of Miami, Florida. Silverstein alleged that EIC used his servers to deliver spam containing sexually explicit content, and further that the span did not have the "SEXUALLY-EXPLICIT" designation that is required by 15 U.S.C § 7704 and 16 C.F.R. § 316.4(a). Without this designation, Silverstein's servers were unable to filter these messages from regular email, and some of these emails were delivered, via Silverstein's servers, to a personal computer in Santa Clara County, California.

Personal jurisdiction rulings, including decisions to dismiss for lack of personal jurisdiction, are reviewed de novo. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). A denial of a motion for reconsideration is reviewed for an abuse of discretion. *MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1081 (9th Cir. 2006).

We employ a three-part test to analyze whether a party's minimum contacts are sufficient. This test is satisfied when,

> (1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities n the forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable.

Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000). The plaintiff bears the burden of satisfying the first two prongs of the test. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006).

Silverstein failed to establish the first prong of the test because he does not show how any of the defendants availed themselves to the forum. All of the defendants are Florida residents and the only business address is located in Miami, Florida. Silverstein has offered no evidence to rebut the defendants' sworn affidavits, based on personal knowledge, that indicate they were not the parties responsible for sending offending emails to California. Because Silverstein has not shown that any of the defendants have any contact with California, there is no basis for either specific or general jurisdiction. Personal jurisdiction over the parties does not exist.

Silverstein also claims that EIC was unresponsive to discovery requests, and that if EIC was responsive, he could have sufficiently established jurisdiction. However, he

never made a formal motion for jurisdictional discovery. Therefore, he cannot claim he was denied the opportunity to properly establish jurisdiction.

After failing to establish jurisdiction, Silverstein requested the district court to reconsider its decision to dismiss for lack of personal jurisdiction. "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). In this case, Silverstein failed to offer any newly discovered evidence or to identify error committed by the district court that would require it to grant a motion for reconsideration. We therefore conclude the district court did not abuse its discretion in denying the motion.

AFFIRMED.

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Palo Alto, CA 94306

Phone (650) 566-8500
Fax: (650) 618-8687
Email: silverstein-experienced.internet@netatty.com

Attorney for Plaintiff William Silverstein

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN JOSE DIVISION)

WILLIAM SILVERSTEIN, an individual Plaintiff, v. EXPERIENCED INTERNET.COM, INC., a Florida corporation, PATRICIA QUESADA, an individual, and DOES 1-50, Defendants.	Case No.: C 05-0160 PVT PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF ORDER DISMISSING ACTION Date: September 6, 2005 Time: 10:00 a.m. Judge: Patricia V. Trumbull

Pursuant to Federal Rule of Evidence 201(b)(2), Plaintiff, by and through his counsel, hereby requests that this Court take judicial notice of:

1. A press release touting "SexSearch.com Adult Personals" issued on July 8, 2005, with contact information for Ross Horwitz (Ross@SexSearch.com). A true and correct copy of the press release is attached as Exhibit "A" to this Request for Judicial Notice.

2. A press release touting "SexSearch.com adult personals" issued on July 8, 2005, with contact information for Ross Horwitz (Ross@SexSearch.com). A true and correct copy of the press release is attached as Exhibit "B" to this Request for Judicial Notice.

3. The page at Internet address <http://www.cyberflowsolutions.com/contact.html > lists contact information for Cyber Flow Solutions, Inc. at an address in Los Angeles, California and a telephone number corresponding to the telephone number on the press releases. A true and correct copy of the page at that address is attached as Exhibit "C" to this Request for Judicial Notice.

4. WHOIS records indicate that CYBERFLOWSOLUTIONS.COM and SEXSEARCH.COM have the same registrant contact information.

5. A true and correct copy of the current WHOIS record for CYBERFLOWSOLUTIONS.COM is attached as Exhibit "D" to this Request for Judicial Notice.

6. A true and correct copy of the current WHOIS record for SEXSEARCH.COM is attached as Exhibit "E" to this Request for Judicial Notice.

DATED: August 9, 2005

INTERNET ATTORNEY

BY: /s/ Timothy J. Walton

TIMOTHY J. WALTON
Attorney for the Plaintiff

QUOTE.COM

PRNewswire

Enrollment Hits 3.5 Million at Sex Dating Website

8 July 2005, 09:15am ET

TORONTO, July 8 /PRNewswire/ -- In just 18 months, SexSearch.com Adult Personals and dating has surpassed 3.5 million member sign-ups at its website http://www.sexsearchcom.com/index.html.

Here's what has people's attention: SexSearch.com operates an online adult personals and swingers dating service that caters to adults seeking sex from other like-minded individuals.

This rapid growth may be a telling commentary on how society is evolving and how people are expressing themselves more as individuals.

When it comes to dealing with sex and relationships, people are no longer blindly following traditional behavior. People with healthy sexual appetites seem to be seeking certain answers online, and the anonymity of the Internet certainly makes it easier.

So what is SexSearch.com's secret to success? According to company owner Damian Cross, "We provide our members with a discreet way to find individuals with like-minded sexual interests who are willing to share a sexual encounter." With over 3.5 million members, they certainly seem to be doing something right.

SexSearch.com is the world's fastest-growing adult personals and swingers dating site. SexSearch offers men

and women the ability to post their profile for 100 percent free. With more than 3.5 million members, SexSearch is the community of choice for anyone interested in sex. For more information, visit http://www.sexsearchcom.com/index.html.

Contact:
Ross Horwitz
ICQ: 348456583
Tel.: 323.464.5500
Ross@Sexsearch.com

This release was issued through eReleases(TM). For more information, visit http://www.ereleases.com.

SOURCE SexSearch.com Adult Personals
-0- 07/08/2005
/CONTACT: Ross Horwitz, SexSearch.com, ICQ: 348456583, or +1-323-464-5500,

Ross@Sexsearch.com

/
/Web site:

http://www.sexsearchcom.com/index.html
/
CO: SexSearch.com; SexSearch.com Adult Personals
ST: Ontario
IN: MLM CPR ENT
SU:
MZ
-- PHF009 --
1830 07/08/2005 09:15 EDT

SexSearch.com Adult Personals Was Mentioned On the Howard Stern Show
http://ww2.wpvi.com/global/story.asp?s=3571535&ClientType=Printable

<<Back

ACTION NEWS

SexSearch.com Adult Personals Was Mentioned On the Howard Stern Show

TORONTO, July 8 /PRNewswire/ -- For those of you who didn't listen in, SexSearch.com adult personals got name-dropped on the Howard Stern Show. Heidi Fleiss, Hollywood's madam and sex boutique owner, mentioned SexSearch.com adult personals three times in the course of the show, joking on how she should post her profile, while Howard Stern dropped the name twice.

SexSearch.com adult personals are finally getting the mainstream exposure you would expect, and it's just the beginning. More and more, people are associating SexSearch.com adult personals as the only destination online for adult personals. If you have haven't checked it out yet, please go to http://www.sexsearch.com and sign up for a free account. You never know whose profile you might find.

SexSearch.com is the world's fastest-growing adult personals and swingers dating site. SexSearch.com adult personals offer men and women the ability to post their profile for 100 percent-free. With millions of members, SexSearch.com adult personals are the community of choice for anyone interested in sex. For more information, visit http://www.sexsearch.com .

If you'd like more information about this topic, please call Ross Horwitz at 323.464.5500 or e-mail Ross at Ross@SexSearch.com.

Contact: Ross Horwitz ICQ: 348456583 Tel. 323.464.5500
Ross@SexSearch.com

This release was issued through eReleases(TM). For more information, visit http://www.ereleases.com.

CONTACT: Ross Horwitz of SexSearch.com, ICQ: 348456583 or +1-323-464-5500or Ross@SexSearch.com

Web site: http://www.sexsearch.com//

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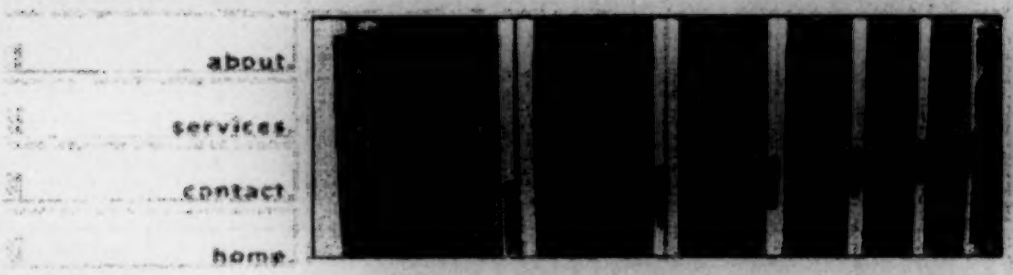

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Ways To Reach Us

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Phone: (323) 464-5500
Fax: (323) 464-5521
E-mail: contact@cyberflowsolutions.com

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OpenSRS Whois Utility

Whois info for,
c cyberflowsolutions.com:

Registrant:
Stallion.com FSC Limited
12 Kingslyn Ave.
Kingston 10, W.I. N/A
JM

Domain name:
CYBERFLOWSOLUTIONS.COM

Administrative Contact:
Francis, Camelia
stallion380@hotmail.com
12 Kingslyn Ave.
Kingston 10, W.I. N/A
JM
(876) 978-5424 Fax: N/A

Technical Contact:
Francis, Camelia
stallion380@hotmail.com
12 Kingslyn Ave.
Kingston 10, W.I. N/A
JM
(876) 978-5424 Fax: N/A

BEST AVAILABLE COPY

Registrar of Record: TUCOWS, INC.
Record last updated on 12-Jul-2005.
Record expires on 16-Nov-2005.
Record created on 16-Nov-2004.

Domain servers in listed order:
NS1.CYBERFLOWSOLUTIONS.COM 209.47.178.21
NS2.CYBERFLOWSOLUTIONS.COM 209.47.178.22

Domain status: ACTIVE

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Marketplace By Resellers for Resellers

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Whois info for,
c sexsearch.com:

Registrant:
Stallion.com FSC Limited
12 Kingslyn Ave.
Kingston 10, W.I. N/A
JM

Domain name: SEXSEARCH.COM

Administrative Contact:
Francis, Camelia
stallion380@hotmail.com
12 Kingslyn Ave.
Kingston 10, W.I. N/A
JM
(876) 978-5424

Technical Contact:
Francis, Camelia stallion380@hotmail.com
12 Kingslyn Avenue
Kingston 10, WI N/A
JM
876-978-5424

Registrar of Record: TUCOWS, INC.
Record last updated on 15-Oct-2004.
Record expires on 24-Nov-2005.
Record created on 25-Nov-1998.

Domain servers in listed order:
NS1.SEXSEARCH.COM 209.47.169.91
NS2.SEXSEARCH.COM 209.47.169.101

Domain status: REGISTRAR-LOCK

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